1990

State of Utah v. Frank David Gentry : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	Case No. 900442
v.	:	
FRANK DAVID GENTRY,	:	Category No. 13
Defendant-Respondent.	:	

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is whether the court of appeals erroneously held that State v. Gibbons, 740 P.2d 1309 (Utah 1987), adopted a "strict compliance" with rule 11(5), Utah Rules of Criminal Procedure, which supersedes the "record as a whole" test traditionally applied on review to determine whether a guilty plea was knowingly and voluntarily entered.

OPINION BELOW

The court of appeals' opinion was issued on August 24, 1990, and appears in State v. Gentry, 141 Utah Adv. Rep. 26 (Utah Ct. App. Aug. 24, 1990) (a copy of the court's opinion is contained in the addendum).

JURISDICTION OF THIS COURT

This Court has jurisdiction to consider this petition under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1990).

STATEMENT OF THE CASE

Defendant, Frank David Gentry, was charged with theft by deception, a third degree felony, under Utah Code Ann. § 76-6-405 (1990), and criminal trespass, a class C misdemeanor, under Utah Code Ann. § 76-6-206 (1990).

After defendant pled not guilty to the charges, trial commenced before the district court sitting without a jury. After the close of the evidence, but prior to closing arguments, defendant changed his plea from not guilty to guilty of theft, a third degree felony. The State dismissed the criminal trespass charge. The trial court stayed imposition of sentence and placed defendant on eighteen months' probation.

Over two months after the acceptance of his guilty plea, defendant moved to withdraw it. The trial court denied this motion.

On appeal, the court of appeals reversed the trial court's denial of defendant's motion to withdraw his guilty plea and remanded the case for a new trial on the original charges. State v. Gentry, 141 Utah Adv. Rep. 26 (Utah Ct. App. Aug. 24, 1990).

STATEMENT OF FACTS

A recitation of the facts of defendant's crimes is not necessary for purposes of this petition.[1] The relevant facts are those stated above in the Statement of the Case.

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[1] The facts underlying the charges against defendant are accurately summarized in the court of appeals' opinion. Gentry, 141 Utah Adv. Rep. at 26-27.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY HELD THAT STATE V. GIBBONS, 740 P.2D 1309 (UTAH 1987), ADOPTED A TEST OF STRICT COMPLIANCE WITH RULE 11(5), UTAH RULES OF CRIMINAL PROCEDURE, WHICH SUPERSEDES THE "RECORD AS A WHOLE" TEST TRADITIONALLY APPLIED ON REVIEW TO DETERMINE WHETHER A GUILTY PLEA WAS KNOWINGLY AND VOLUNTARILY ENTERED.

On appeal to the court of appeals, defendant argued, inter alia, that the trial court abused its discretion in denying his motion to withdraw his guilty plea because "the trial court failed to explain to [him] the elements and facts of the crime of theft before he pled guilty, and . . . further erred by relying on an incomplete record as a substitute for Rule 11 compliance[] in determining that [he] entered his plea with full knowledge and understanding of its consequences." State v. Gentry, 141 Utah Adv. Rep. at 27. The State responded that, under the "record as a whole" test traditionally applied by this Court on post-conviction review of the voluntariness of a guilty plea, see, e.g., Jolivet v. Cook, 784 P.2d 1148 (Utah 1989), cert. denied, 110 S. Ct. 751 (1990); State v. Copeland, 765 P.2d 1266 (Utah 1988); State v. Miller, 718 P.2d 403, 405 (Utah 1986) (per curiam), the trial court had not abused its discretion.[2]

---

[2] The "record as a whole" test was stated in Miller as follows:

> [T]he absence of a finding under [rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving.

718 P.2d at 405.

In reversing and remanding to allow defendant to withdraw his guilty plea, the court of appeals definitively rejected the State's argument that the "record as a whole" test applied, concluding that in State v. Gibbons, this Court "effectively replac[ed] the 'record as a whole' test with a strict Rule 11(5) compliance test in accepting a defendant's guilty plea," Gentry, 141 Utah Adv. Rep. at 28--i.e., if the trial court has not strictly complied with rule 11(5), the guilty plea, although perhaps otherwise voluntary, must automatically be vacated. This conclusion misconstrues Gibbons and ignores significant language in both pre-Gibbons and post-Gibbons opinions of this Court that clearly cuts against the notion that Gibbons abandoned the record as a whole test for determining the voluntariness, and thus validity, of a guilty plea.

In Gibbons, this Court did not review either the trial court's ruling on a motion to withdraw a guilty plea or the voluntariness of the defendant's guilty pleas. Rather, the Court, in the context of remanding the case because an attack on the voluntariness of a guilty plea must first be presented to the trial court in the form of a motion to withdraw, concluded that "a statement of the law concerning the taking of guilty pleas in all trial courts in this state is appropriate." Gibbons, 740 P.2d at 1312. It then set out the specific requirements for taking of guilty pleas under rule 11 for the purpose of assisting the trial court on remand in determining the validity of the defendant's pleas. Ibid. The Gibbons Court did not even mention the record as a whole test for determining voluntariness of a

guilty plea, and the reason seems obvious: the Court was not reviewing the trial court record to determine the voluntariness of the defendant's pleas. Thus, the court of appeals' conclusion that Gibbons replaced the record as a whole test with a strict compliance test reads far too much into Gibbons. The Gibbons Court simply did not address that issue.

Furthermore, certain language in several post-Gibbons opinions of this Court strongly suggests that the record as a whole test was not modified by Gibbons. For example, in Jolivet v. Cook, this Court stated:

> We first address Jolivet's claim that his guilty pleas were unknowing and involuntary. Specifically, Jolivet argues that Judge Burns erred in the taking of his guilty pleas because he did not make findings that Jolivet understood the elements of each crime charged and how those elements related to the facts, as required by State v. Gibbons, 740 P.2d 1309 (Utah 1987), or that Jolivet knew the possibility of the imposition of consecutive sentences. In fact, Jolivet claims that he did not know or understand these things when he entered his pleas.
>
> [Rule 11(5)(d)] requires that before a trial court accepts a guilty plea, it must find that the defendant understands the nature and elements of the offense to which he or she is entering the plea. In Gibbons, this Court stated that in making this finding, the trial court must ensure that the defendant understands "the elements of the crimes charged and the relationship of the law to the facts." Id. at 1312. In addition, [rule 11(5)(e)] requires that before the trial court accepts a guilty plea, it must find that the defendant knows of the possibility of the imposition of consecutive sentences. The record clearly shows that at the time the guilty pleas were accepted, Judge Burns did not make the findings required by [rule 11(5)], i.e., that Jolivet understood the elements of each crime charged and how these elements related to the facts

> and that Jolivet knew the possibility of the imposition of consecutive sentences. However, this Court has held, "[T]he absence of a finding under [rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving." State v. Miller, 718 P.2d 403, 405 (Utah 1986); Brooks v. Morris, 709 P.2d 310, 311 (Utah 1985); Warner v. Morris, 709 P.2d 309, 310 (Utah 1985).

784 P.2d at 1149-50 (footnotes omitted). And in State v. Copeland, the Court, without citing Gibbons, said:

> The United States Supreme Court has said, "[T]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." McCarthy, 394 U.S. at 470, 89 S.Ct. at 1173 (emphasis in the original). We think the most effective way to do this is to have the defendant state in his own words his understanding of the offense and the actions which make him guilty of the offense. By this statement, the trial court can assure itself that the defendant is truly submitting a voluntary and knowing plea. Moreover, the record on appeal will clearly reflect the defendant's understanding. Although this method is therefore preferable to others, it is not absolutely required. The test is voluntariness. We hold that the record demonstrates that defendant admitted acts sufficient to justify his conviction of the offense to which he pleaded guilty.

765 P.2d at 1273 (footnote omitted and emphasis added).

Although both Jolivet and Copeland involved pre-Gibbons guilty pleas, Gentry, 141 Utah Adv. Rep. at 28, this Court did not note or attach any significance to that fact in either opinion, and, in fact, directly applied Gibbons in Jolivet in concluding that although the trial court did not strictly comply with rule 11, the record as a whole demonstrated that Jolivet

entered his guilty pleas knowingly and voluntarily. Jolivet, 784 P.2d at 1149-51. This seriously undermines the court of appeals' effort to distinguish Jolivet and Copeland on the basis that the record as a whole test was applied in those cases because they involved pre-Gibbons guilty pleas.[3] Significantly, in State v. Smith, 777 P.2d 464 (Utah 1989), which involved a post-Gibbons guilty plea, this Court apppeared to apply the record as whole test in reversing the trial court's denial of the defendant's motion to withdraw.[4]

Finally, that the record as a whole test represents the most reasonable standard upon which to assess a post-conviction attack on the voluntariness of a guilty plea is made clear in the following passage from State v. Kay, 717 P.2d 1294 (Utah 1986):

> A final word on the State's Rule 11 arguments. In its zeal to set aside Kay's guilty pleas or renege on the bargain that was struck, the State has argued, in effect, that otherwise voluntary and lawful guilty pleas should always be voided when the trial court violates any provision of Rule 11. The concurring opinions of Chief Justice Hall and Justice Howe adopt this reasoning as well. This position is shortsighted, for to follow

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[3] It is not clear what significance State v. Hickman, 779 P.2d 670 (Utah 1989) (per curiam), which was issued five days before Jolivet, has in this inquiry. Unlike Jolivet, Hickman declined to apply Gibbons to a pre-Gibbons guilty plea on the ground that Gibbons represented a clear break from the past and would therefore not be applied retroactively. Hickman, 779 P.2d at 672 n.1. Insofar as Hickman might be read to support the court of appeals' strict compliance test, it is inconsistent with Jolivet and should not be followed.

[4] The court of appeals obviously disagrees with this reading of Smith, having cited it in support of its decision in the instant case, Gentry, 141 Utah Adv. Rep. at 28, and stating directly in State v. Pharris, Case No. 890549-CA, slip op. at 8 n.6 (Utah Ct. App. Sept. 14, 1990), a case issued after Gentry, that Smith applied the "strict compliance test articulated in Gibbons."

> it would be to sanction a remedy far worse than the wrong. If we were to to hold any violation of Rule 11 automatically voids the resultant plea, even when the plea is knowingly and voluntarily entered, we would encourage defendant's, convicted and sentenced after such a plea, to attack their convictions for purely tactical reasons, either by direct appeal or by seeking habeas corpus long after the fact. We have refused to overturn convictions upon such challenges in the past, e.g., State v. Knowles, Utah, 709 P.2d 311 (1985); State v. Morris, Utah, 709 P.2d 310 (1985), [sic] and we find no reason to encourage such attacks in the future.
>
> Overturning such convictions--which we would have to do if we embraced the rationale advanced by the State and the Chief Justice's concurring opinion--would require the State to reprosecute numerous defendants, probably long after the challenged guilty pleas were entered and when the passage of time would make reprosecution impractical, if not impossible. Almost certainly, the ultimate result would be to free a number of convicted persons for nothing more than technical errors in the acceptance of their voluntary guilty pleas.

717 P.2d at 1301-02 (footnote omitted)[5]. This view is consistent with the harmless error rule long recognized by this court in a variety of contexts. See, e.g., State v. Johnson, 771 P.2d 1071

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[5] Most jurisdictions apply a record as a whole test rather than the strict compliance rule adopted by the court of appeals. See, e.g., United States v. Barry, 895 F.2d 702 (10th Cir. 1990) (district court's failure to strictly comply with rule 11 does not warrant reversal where defendant's knowledge of rights waived was otherwise apparent); Wood v. State, 190 Ga.App. 179, 378 S.E.2d 520 (Ga. App. 1989) (where defendant was otherwise informed of rights waived, harmless error standard is applied to trial court's failure to comply with rule governing taking of pleas); People v. Bettistea, 181 Mich.App. 194, 448 N.W.2d 781, 783 (Mich. App. 1989) ("record as a whole" demonstrated that plea was made knowingly and voluntarily); People v. Harris, 61 N.Y.2d 9, 459 N.E.2d 170 (N.Y. 1983) (voluntariness of plea determined by considering all relevent circumstances surrounding it, not by judge's ritualistic recitation of rights waived).

(Utah 1989) (harmless error standard for nonconstitutional error); State v. Verde, 770 P.2d 116, 121 n.8 (Utah 1989) ("with respect to certain constitutional errors, we must place on the State the burden of proving that the error was harmless beyond a reasonable doubt"). See also Utah R. Crim. P. 30(a); Utah R. Evid. 103(a); Utah R. Civ. P. 61. Interestingly, the court of appeals did not so much as mention Kay, even though the State cited the foregoing quoted language from Kay to it in its brief. See State v. Gentry, Case No. 890145-CA, Br. of Appellee at 17-18.

In sum, a careful reading of Gibbons and this Court's pre- and post-Gibbons decisions indicates that the court of appeals erred in holding that Gibbons replaced the record as a whole test with a strict compliance test. A strict compliance test is not required either by Gibbons or logic.

Accordingly, this Court should grant certiorari because the court of appeals has rendered a decision on a question of law which is in conflict with decisions of this Court. Utah R. App. P. 46(b). Insofar as the issue of what standard applies on review of the voluntariness of a guilty plea is unsettled in light of Gibbons, certiorari should be granted because the court of appeals has decided an important question of law which should be settled by this Court. Utah R. App. P. 46(d).

CONCLUSION

Based on the foregoing arguments, the State's petition for certiorari should be granted pursuant to rule 46(b) or (d), Utah Rules of Appellate Procedure.

RESPECTFULLY submitted this 25th day of September, 1990.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Petition were mailed, postage prepaid, to George T. Waddoups, Attorney for Respondent, 4252 South 700 East, Salt Lake City, Utah 84107, this 25th day of September, 1990.

David B. Thompson

ADDENDUM

been excluded, if the defense was not to be permitted to call Alvin Barker in rebuttal.

Having concluded that the court erred in failing to exclude Deputy Troester's restatement of Alvin Barker's opinion of Deputy Naylor's performance, we must now consider whether this error was harmless or prejudicial. An error is harmless, and not grounds for reversing a conviction, if, absent the error, there is no substantial likelihood of a better result for the defendant. Utah R. Crim. P. 30(a); *State v. Johnson*, 784 P.2d 1135, 1140 (Utah 1989); *State v. Verde*, 770 P.2d at 116, 120-122 (Utah 1989).

In this case, one of the main points of the defense was that Deputy Naylor's use of force was excessive and overly aggressive. There were substantial factual discrepancies between the eyewitnesses' accounts of what happened, and Deputy Naylor's account (from which we have drawn the above statement of the facts) tends more to justify his role in this altercation than do the accounts of the Barker parents and of Gary Barker. In resolving this factual conflict, the testimony of Alvin Barker may well have been important. Alvin Barker intervened in the fight to aid Deputy Naylor in ending the struggle, but at trial, he saw no need for the deputy's resort to violence and portrayed Gary Barker's actions as mainly evasive and self-protective. Thus, the jury could well have found that Alvin Barker's testimony was critical in determining what happened, assessing the extent and nature of Gary Barker's resistance, and in evaluating his claim of self-defense.

Given the conflicting evidence, and also in view of the rather lengthy jury deliberations, this appears to have been a close case factually. We therefore conclude that, if Alvin Barker's hearsay statement had been excluded or if Alvin Barker had been permitted to testify concerning it, there is a significant possibility of a result more favorable to the defendant Gary Barker.

We therefore reverse and remand.

Robert L. Newey, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

1. Robert L. Newey, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(10) (Supp. 1990).

2. Deputy Naylor was the only witness called by the State who was present when the crime was committed. Since the jury found for the State, we view the facts in the light most favorable to sustaining the convictions, *State v. Gardner*, 789 P.2d 273, 285 (Utah 1989). We have therefore relied extensively on Deputy Naylor's testimony and resolved conflicts and doubts in the evidence according to his view of the facts.

3. *See* Utah R. Evid. 801(c).

4. *See United States v. Brennan*, 798 F.2d 581, 587-89 (2d Cir. 1986) *cert. denied*, __U.S.__, 109 S. Ct. 1003 (1989); *United States v. Williams*, 751 F.2d 594, 606-10 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

5. *United States v. West*, 670 F.2d 675, 686-87 (7th Cir. 1982) *cert. denied* 457 U.S. 1124 (1982); *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971); *see United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 844 (1988) (cross-examination requirement of Fed. R. Evid. 801(d)(1) and right of confrontation are satisfied where declarant takes the stand and responds to questions concerning the out-of-court statement despite claimed lack of recall); 4 D. Louisell & C. Mueller, *Federal Evidence* §419 at 179-81 (1985).

Cite as
141 Utah Adv. Rep. 26

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Frank David GENTRY,
Defendant and Appellant.

No. 890145-CA
FILED: August 24, 1990

Fifth District, Iron County
Honorable J. Philip Eves

ATTORNEYS:

George T. Waddoups, Salt Lake City, for Appellant

R. Paul Van Dam and Sandra L. Sjogren, Salt Lake City, for Appellee

Before Judges Billings, Garff, and Greenwood.

OPINION

GREENWOOD, Judge:

Appellant Frank D. Gentry appeals the trial court's denial of his motion to withdraw his guilty plea. We reverse and remand.

Gentry was one of six children born to Milton and Ivy Jane Gentry. Milton owned a 1,840 acre ranch located near the Beaver/Iron County line in southern Utah. In 1949, Gentry built a cinder block cabin on the ranch. Since that time, Gentry worked the ranch on a daily basis and lived in the cabin nearly full time. Milton died in 1962 and, by holographic will, left the ranch to Ivy Jane and their six children. After his father died, Gentry continued to work the ranch. In 1966, Gentry's siblings and Ivy Jane executed a power of attorney authorizing Gentry to manage the ranch. When Ivy died intestate in

1977, Gentry and his siblings each inherited an equal share of the ranch.

Soon after Gentry began managing the ranch, antagonism developed between Gentry and his siblings. Their relationship eroded and the family began to question Gentry's authority to manage the ranch. The ranch also became the subject of a series of lawsuits and court-ordered sales. In 1981, as a result of a lawsuit to partition the ranch, the district court ordered a sale of the ranch. Gentry's interest in the ranch was purchased for approximately $22,000. Gentry objected to the validity of the sale, claiming that the payment was intended solely to reimburse him for improvements and work he had performed on the ranch. Several months passed before he negotiated the check representing his sale proceeds. He allegedly later used the money for improvements and upkeep on the ranch.

After the 1981 partition sale, Gentry continued to use the ranch. In 1983, Gentry retained an attorney and attempted to purchase a portion of the ranch from two of the owners, but did not consummate any purchase. On November 10, 1986, Gentry's brothers, Mack and Joseph Gentry, each sold their interest in the ranch to Dan and Paul Roberts, sons of Gentry's sister, Mary Lou.

In 1986 and 1987, without permission from the ranch owners, Gentry and his son, Curtis, received payments from Carlyle Stirling for grazing on the ranch property. They did not transmit any of the monies collected from Stirling to the ranch owners.

Dan and Paul Roberts brought charges of theft by deception and criminal trespass against Gentry and his son Curtis. Gentry and his son countered with a civil suit for quiet title and adverse possession against all the ranch co-tenants.

On September 20, 1988, Gentry appeared at an arraignment before Judge J. Philip Eves. Gentry reviewed and signed an affidavit, which set forth the charge of theft, but not the alleged facts. Gentry pled not guilty.

Trial was held before Judge Eves on January 25, 1989. After the close of evidence, but prior to closing arguments, Gentry changed his plea from not guilty to guilty of theft, a third degree felony. The State dismissed the criminal trespass charge. Imposition of sentence was stayed pending Gentry's successful completion of eighteen months probation. Conditions of probation included Gentry agreeing to 1) not enter the ranch property without prior written consent of Paul or Dan Roberts, 2) not harass or offensively communicate with any family member, 3) dismiss his pending civil suit against persons holding an ownership interest in the ranch property, and 4) relinquish any interest in the property.

On February 16, 1989, Gentry's counsel withdrew. Gentry retained new counsel and on February 24, 1989, filed a notice of appeal of the trial court's decision. On April 6, 1989, Gentry filed a motion and supporting memorandum to withdraw his guilty plea and to remand for a preliminary hearing. This court stayed the appeal for sixty days or until the trial court ruled on Gentry's motion to withdraw his guilty plea. On August 28, 1989, Gentry filed a motion for a new trial and a motion to disqualify Judge Eves, with supporting memorandum, affidavit of Gentry, and certificate of counsel. On September 1, 1989, Judge Eves denied Gentry's motion to withdraw the plea, but did not rule on Gentry's other two motions.

On appeal, Gentry argues that the trial court erred by 1) denying Gentry's motion to withdraw his guilty plea; 2) failing to dispose of his motion to disqualify the trial judge; and 3) failing to dispose of his motion for a new trial. Gentry also claims he was denied effective assistance of counsel.[1]

WITHDRAWAL OF GUILTY PLEA

Gentry claims the trial court abused its discretion in denying his motion to withdraw his guilty plea. Specifically, Gentry argues that the trial court failed to explain to Gentry the elements and facts of the crime of theft before he pled guilty, and that the trial court further erred by relying on an incomplete record as a substitute for Rule 11 compliance, in determining that Gentry entered his plea with full knowledge and understanding of its consequences. Gentry also asserts that his hearing impairment precluded him from being able to fully understand the factual elements of the charges during the course of the trial.

Utah Code Ann. §77-13-6 (1990) states, in pertinent part, that "[a] plea of guilty ... may be withdrawn only upon good cause shown and with leave of court." We will reverse the denial of a motion to withdraw a guilty plea only when it clearly appears the trial court has abused its discretion by failing to find good cause. *State v. Mildenhall*, 747 P.2d 422, 424 (Utah 1987); *State v. Vasilacopulos*, 756 P.2d 92, 93 (Utah Ct. App. 1988).

Rule 11(5)[2] of the Utah Rules of Criminal Procedure provides, in pertinent part:

> The court may refuse to accept a plea of guilty or no contest, and may not accept the plea until the court has found:
>
> ....
>
> (d) the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements....

Utah R. Crim. P. 11(5).

In cases considered prior to 1987, the Utah Supreme Court held that the record as a whole may affirmatively establish that defendant entered his or her guilty plea with full knowledge and understanding of its consequences and of the rights waived. *State v. Miller*, 718 P.2d 403, 405 (Utah 1986) (per curiam); *Warner v. Morris*, 709 P.2d 309, 310 (Utah 1985); *Brooks v. Morris*, 709 P.2d 310, 311 (Utah 1985) (per curiam).

In *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), however, the supreme court modified its prior decisions and held that the trial court has the burden of ensuring that Rule 11(5) requirements are complied with when a guilty plea is entered. *Id.* at 1312-13. The supreme court stated that "to make a knowing guilty plea, the defendants must understand the elements of the crimes charged and the relationship of the law to the facts." *Id.* at 1312. *Gibbons* noted that a sufficient affidavit may be a starting point in determining whether a defendant has an adequate understanding; however, the court "should then review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it, and fulfill the other requirements imposed by §77-35-11 on the record before accepting the guilty plea." *Id.* at 1314. If a court does not use an affidavit, the requirements in *Gibbons* and in Rule 11(5) must likewise be met and be on the record. *Id.*

This court has interpreted *Gibbons* as effectively replacing the "record as a whole" test with a strict Rule 11(5) compliance test in accepting a defendant's guilty plea. *State v. Valencia*, 776 P.2d 1332, 1335 (Utah Ct. App. 1989) (per curiam); *Vasilacopulos*, 756 P.2d at 94.[3] The supreme court also has regarded *Gibbons* as a new rule of criminal procedure, constituting a clear break with the past. *State v. Hickman*, 779 P.2d 670, 672 n.1 (Utah 1989) (per curiam). Consequently, both Utah appellate courts have refused to apply the *Gibbons* strict compliance test to pre-*Gibbons* guilty pleas. *See, e.g., Hickman*, 779 P.2d at 672 n.1; *Vasilacopulos*, 756 P.2d at 94.

The State claims, however, that the "record as a whole" test remains viable even after *Gibbons*. The State contends that a close reading of *Gibbons* reveals that the supreme court was simply pointing out the preferred and safest method of determining the voluntariness of a plea. The State reasons that since the supreme court was able to review the transcript and determine that the examination of Gibbons was inadequate, it would have remanded the case with an order that the plea be withdrawn rather than remanding for a hearing on the issue of voluntariness if it intended to impose a rule of strict Rule 11 compliance. The State also relies on *Jolivet v. Cook*, 784 P.2d 1148 (Utah 1989) and *State v. Copeland*, 765 P.2d 1266 (Utah 1988) to demonstrate that the supreme court, even after *Gibbons*, relies on the "record as a whole" test.

We cannot agree. First, the State misconstrues *Gibbons*. *Gibbons* does not simply state a preferred method for determining the voluntariness of a plea, but clearly mandates that the trial court must conduct an on-the-record review with defendant of the Rule 11(5) requirements. *Gibbons*, 740 P.2d at 1313-14. Also, the supreme court did not remand *Gibbons* for a hearing on the issue of voluntariness, but for the purpose of allowing defendant to move to withdraw his guilty plea because he had not previously filed such motion. *Id.* at 1311. Finally, it appears that the court applied the "record as a whole" test in *Jolivet* and *Copeland* because the guilty pleas in both cases were entered before the *Gibbons* decision: Jolivet entered his plea in 1984, *see State v. Jolivet*, 712 P.2d 843, 843-44 (Utah 1986) (date of plea revealed in Jolivet's first appeal), and Copeland entered his plea in 1986. *Copeland*, 765 P.2d at 1267.

In this case the record clearly shows that the trial judge failed to comply with *Gibbons* and Rule 11(5). The trial judge did not conduct an on-the-record inquiry concerning Gentry's understanding of the nature and elements of the offense as required by Rule 11(5)(d). The trial court simply determined that because Gentry was present at trial, he was aware of the evidence which had been admitted and the charges against him. However, his understanding of the elements of the crime charged and how those elements relate to the evidence presented may not be presumed from his mere presence during trial. *See Valencia*, 776 P.2d at 1335. We further find it particularly necessary to require strict Rule 11 compliance in this instance, where Gentry contends his hearing disability prevented him from understanding everything that went on during the trial as well as during the proceedings regarding his guilty plea.

Rule 11(5) and *Gibbons* require the vacating of Gentry's guilty plea on the ground that it was not knowingly and voluntarily made. *See State v. Smith*, 777 P.2d 464, 466 (Utah 1989). Thus, we reverse and remand to allow Gentry to withdraw his guilty plea and to proceed to a new trial on the original charges.[4] In light of our decision, we do not reach Gentry's other claims.

Pamela T. Greenwood, Judge

WE CONCUR:

Judith M. Billings, Judge

Regnal W. Garff, Judge

1. The State argues that this appeal is moot since Gentry will complete his eighteen month probation before this court's opinion issues. We do not agree

because the conditions of Gentry's probation, including his promise to abandon both his pending civil action and any interest in the ranch, will continue despite completion of probation.

2. In 1989, the subsection in former Rule 11(e) was redesignated as Rule 11(5). *See* 1989 Utah Laws, ch. 65, §2.

3. *In State v. Thurston*, 781 P.2d 1296, 1301 (Utah Ct. App. 1989), this court used "the record as a whole" language in the opinion, but the issue argued by appellant was that he did not voluntarily plead guilty, because he mistakenly relied on the state's assurance that it would recommend probation rather than incarceration. Neither the state nor appellant addressed the issue of whether *Gibbons* had resulted in the demise of the "record as a whole" test. Therefore, we do not read *Thurston* as supporting the state's position in this case.

4. Usually, when a guilty plea is rescinded the parties are to be placed in the position each had before the contract was entered into. *People v. Superior Court*, 131 Cal. App. 3d 256, 258, 182 Cal. Rptr. 426, 428 (1982); *see also Wilson v. State*, 698 S.W.2d 145, 146 (Tex. Crim. App. 1985) (en banc) (rejects prior case law dictum that permitting a withdrawal of a guilty plea was, in effect, the granting of a new trial). This case, however, presents an unusual factual setting. Although the parties represented to the trial court that all the evidence had been presented prior to the change of plea, it is not clear how Gentry would have proceeded had the guilty plea not been entered. Further, Judge Eves stated in his decision that the court was prepared to determine that Gentry was proven guilty beyond a reasonable doubt at the time of trial of both charges, even if Gentry had not pled guilty. Since neither counsel had presented closing arguments and since it is possible that absent the guilty plea Gentry would have produced further evidence, we find the trial court's declaration of a guilty verdict at the time of the plea nonbinding on remand. Consequently, we find that a new trial is essential to ensure that Gentry has a fair hearing on the charges.

Cite as
141 Utah Adv. Rep. 29

IN THE SUPREME COURT OF THE STATE OF UTAH

PETITIONS FOR WRIT OF CERTIORARI

FILED:

(*Case Name; Supreme Court Number; Date Filed; Citation of Court of Appeals opinion*)

State v. Jonas, 900364, July 27, 1990, 135 Utah Adv. Rep. 38.

Saunders v. Sharp, 900360, July 26, 1990, 135 Utah Adv. Rep. 68.

DENIED:

(*Case Name; Supreme Court Number; Date Denied; Citation of Court of Appeals opinion*)

Cingolani v. Utah Power & Light, 900239, July 20, 1990, 132 Utah Adv. Rep. 43.